



## Testimony

Before the Committee on Resources,  
House of Representatives

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## INDIAN ISSUES

# Timeliness of the Tribal Recognition Process Has Improved, but It Will Take Years to Clear the Existing Backlog of Petitions

Statement of Robin M. Nazzaro, Director  
Natural Resources and Environment



Accountability \* Integrity \* Reliability



Highlights of [GAO-05-347T](#), a testimony before the Committee on Resources, House of Representatives

## Why GAO Did This Study

The Bureau of Indian Affairs' (BIA) regulatory process for recognizing tribes was established in 1978. The process requires groups that are petitioning for recognition to submit evidence that they meet certain criteria—basically that the petitioner has continuously existed as an Indian tribe since historic times. Critics of the process claim that it produces inconsistent decisions and takes too long.

Congressional policymakers have struggled with the tribal recognition issue for over 27 years. H.R. 4933 and H.R. 5134, introduced in the 108<sup>th</sup> Congress, and H.R. 512, which was introduced last week, have focused on the timeliness of the recognition process.

This testimony is based in part on GAO's report, *Indian Issues: Improvements Needed in Tribal Recognition Process* (GAO-02-49, November 2, 2001). Specifically, this testimony addresses (1) the timeliness of the recognition process as GAO reported in November 2001 and (2) the actions the Department of the Interior's Office of Federal Acknowledgment has taken since 2001 to improve the timeliness of the recognition process.

## What GAO Recommends

GAO's November 2001 report recommended that BIA develop a strategy that identified how to improve the responsiveness of the process for federal recognition.

[www.gao.gov/cgi-bin/getrpt?GAO-05-347T](http://www.gao.gov/cgi-bin/getrpt?GAO-05-347T).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Robin M. Nazzaro at (202) 512-3841 or [nazzaror@gao.gov](mailto:nazzaror@gao.gov).

## INDIAN ISSUES

# Timeliness of the Tribal Recognition Process Has Improved, but It Will Take Years to Clear the Existing Backlog of Petitions

## What GAO Found

In November 2001, GAO reported that BIA's tribal recognition process was ill equipped to provide timely responses to tribal petitions for federal recognition. BIA's regulations outline a process for evaluating a petition that was designed to take about 2 years. However, the process was being hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, such as local municipalities and other Indian tribes. As a result, there were a growing number of completed petitions waiting to be considered. In 2001, BIA officials estimated that it could take up to 15 years for all the completed petitions to be resolved. To correct these problems, we recommended that BIA develop a strategy that identified how to improve the responsiveness of the process for federal recognition. Such a strategy was to include a systematic assessment of the resources available and needed that could lead to the development of a budget commensurate with the workload.

While Interior's Office of Federal Acknowledgment has taken a number of important steps to improve the responsiveness of the tribal recognition process, it still could take 4 or more years, at current staff levels, to work through the existing backlog of petitions currently under review, as well as those that are ready and waiting for consideration. In response to GAO's 2001 report, two vacancies within the Office of Federal Acknowledgment were filled, resulting in a professional staff of three research teams, each consisting of a cultural anthropologist, historian, and genealogist. In addition, the September 2002 Strategic Plan, issued by the Assistant Secretary for Indian Affairs in response to GAO's report, has been almost completely implemented by the Office of Federal Acknowledgment. The main impediment to completely implementing the Strategic Plan and to making all of the information that has been compiled more accessible to the public is the fact that BIA continues to be disconnected from the Internet because of ongoing computer security concerns involving Indian trust funds.

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to discuss our work on the Bureau of Indian Affairs' (BIA) regulatory process for federally recognizing Indian tribes.<sup>1</sup> There are currently 562 recognized tribes in the United States with a total membership of about 1.8 million. In addition, several hundred groups are currently seeking recognition. Congressional policymakers have struggled with the tribal recognition issue for over 27 years. Since 1977, 28 bills have been introduced to add a statutory framework for the tribal recognition process. Additional bills have also been introduced to recognize specific tribes; provide grants to local communities or Indian groups involved in the tribal recognition process; or, more recently, address the timeliness of the recognition process. H.R. 4933 and H.R. 5134, introduced in the 108<sup>th</sup> Congress, and H.R. 512, which was introduced last week, have focused on the timeliness of the recognition process.

As you know, federal recognition of an Indian tribe can dramatically affect economic and social conditions for the tribe and the surrounding communities. Federally recognized tribes are eligible to participate in federal assistance programs. In fiscal year 2004, the Congress appropriated about \$6 billion for programs and funding almost exclusively for recognized tribes. Recognition also establishes a formal government-to-government relationship between the United States and a tribe. The quasi-sovereign status created by this relationship exempts certain tribal lands from most state and local laws and regulations. Such exemptions generally apply to lands that the federal government has taken in trust for a tribe or its members. Currently, about 54 million acres of land are held in trust.<sup>2</sup> The exemptions also include, where applicable, laws regulating gaming. The Indian Gaming Regulatory Act of 1988, which regulates Indian gaming operations, permits a tribe to operate casinos on land in trust if the state in which it lies allows casino-like gaming and the tribe has entered into a compact with the state regulating its

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<sup>1</sup>In this statement the term "Indian tribe" encompasses all Indian tribes, bands, villages, groups, and pueblos, as well as Eskimos and Aleuts.

<sup>2</sup>Tribal lands not in trust may also be exempt from state and local jurisdiction for certain purposes in some instances.

gaming businesses.<sup>3</sup> In fiscal year 2003, federally recognized tribes reported an estimated \$16.7 billion in gaming revenue.

BIA's regulatory process for recognizing tribes was established in 1978. The process requires groups that are petitioning for recognition to submit evidence that they meet certain criteria—basically that the group has continuously existed as an Indian tribe since historic times. Critics of the process claim that it produces inconsistent decisions and takes too long. In November 2001, we reported on BIA's regulatory recognition process, including the timeliness of the process, and recommended ways to improve it.<sup>4</sup> We testified on this issue in February 2002 before the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs,<sup>5</sup> and again in September 2002 before the Senate Committee on Indian Affairs.<sup>6</sup> Our testimony today is based on our November 2001 report and the actions the Department of the Interior's Office of Federal Acknowledgment has taken to improve the timeliness of the recognition process.<sup>7</sup>

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<sup>3</sup>25 U.S.C. § 2701.

<sup>4</sup>GAO, *Indian Issues: Improvements Needed in Tribal Recognition Process*, GAO-02-49 (Washington, D.C.: Nov. 2, 2001).

<sup>5</sup>GAO, *Indian Issues: More Consistent and Timely Tribal Recognition Process Needed*, GAO-02-415T (Washington, D.C.: Feb. 7, 2002).

<sup>6</sup>GAO, *Indian Issues: Basis for BIA's Tribal Recognition Decisions Is Not Always Clear*, GAO-02-936T (Washington, D.C.: Sept. 17, 2002).

<sup>7</sup>In 2001, the tribal recognition process was administered by BIA's Branch of Acknowledgment and Research. In a reorganization, effective July 27, 2003, the Branch of Acknowledgment and Research was elevated and moved into Interior's Office of the Assistant Secretary for Indian Affairs and renamed the Office of Federal Acknowledgment. In this statement, when referring to our work from 2001, we will refer to the tribal recognition process as a BIA process; in all other cases, we will refer to it as a process within Interior's Office of Federal Acknowledgment.

In summary,

- In November 2001, we reported that BIA's tribal recognition process was ill equipped to provide timely responses to tribal petitions for federal recognition. BIA's regulations outline a process for evaluating a petition that was designed to take about 2 years. However, the process was hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, such as local municipalities and other Indian tribes. As a result, there were a growing number of completed petitions waiting to be considered. In 2001, BIA officials estimated that it could take up to 15 years for all the completed petitions to be resolved. To correct these problems, we recommended that BIA develop a strategy that identified how to improve the responsiveness of the process for federal recognition. Such a strategy was to include a systematic assessment of the resources available and needed that could lead to the development of a budget commensurate with the workload.
- While Interior's Office of Federal Acknowledgment has taken a number of important steps to improve the responsiveness of the tribal recognition process it still could take 4 or more years, at current staff levels, to work through the existing backlog of petitions currently under review, as well as those that are ready and waiting for consideration. In response to our 2001 report, two vacancies within the Office of Federal Acknowledgment were filled, resulting in a professional staff of three research teams, each consisting of a cultural anthropologist, historian, and genealogist. In addition, the September 2002 Strategic Plan, issued by the Assistant Secretary for Indian Affairs in response to our report, has been almost completely implemented by the Office of Federal Acknowledgment. The main impediment to completely implementing the Strategic Plan and to making all of the information that has been compiled more accessible to the public is the fact that BIA continues to be disconnected from the Internet because of ongoing computer security concerns involving Indian trust funds.

## **Background**

Historically, the U.S. government has granted federal recognition through treaties, congressional acts, or administrative decisions within the executive branch—principally by the Department of the Interior. In a 1977 report to the Congress, the American Indian Policy Review Commission criticized the department’s tribal recognition policy. Specifically, the report stated that the department’s criteria for assessing whether a group should be recognized as a tribe were not clear and concluded that a large part of the department’s policy depended on which official responded to the group’s inquiries. Nevertheless, until the 1960s, the limited number of requests for federal recognition gave the department the flexibility to assess a group’s status on a case-by-case basis without formal guidelines. However, in response to an increase in the number of requests for federal recognition, the department determined that it needed a uniform and objective approach to evaluate these requests. In 1978, it established a regulatory process for recognizing tribes whose relationship with the United States had either lapsed or never been established—although tribes may also seek recognition through other avenues, such as legislation or Department of the Interior administrative decisions, which are unconnected to the regulatory process. In addition, not all tribes are eligible for the regulatory process. For example, tribes whose political relationship with the United States has been terminated by the Congress, or tribes whose members are officially part of an already recognized tribe, are ineligible to be recognized through the regulatory process and must seek recognition through other avenues.

The 1978 regulations lay out seven criteria that a group must meet before it can become a federally recognized tribe. Essentially, these criteria require the petitioner to show that it is descended from a historic tribe and is a distinct community that has continuously existed as a political entity since a time when the federal government broadly acknowledged a political relationship with all Indian tribes. The burden of proof is on petitioners to provide documentation to satisfy the seven criteria. The technical staff within Interior’s Office of Federal Acknowledgment, consisting of historians, anthropologists, and genealogists, reviews the submitted documentation and makes

recommendations on a proposed finding either for or against recognition. Staff recommendations are subject to review by Interior's Office of the Solicitor and senior officials within the Office of the Assistant Secretary for Indian Affairs. The Assistant Secretary for Indian Affairs makes the final decision regarding the proposed finding, which is then published in the *Federal Register*, and a period of public comment, document submission, and response is allowed. The technical staff reviews the comments, documentation, and responses and makes recommendations on a final determination that are subject to the same levels of review as a proposed finding. The process culminates in a final determination by the Assistant Secretary who, depending on the nature of further evidence submitted, may or may not rule the same way as the proposed finding. Petitioners and others may file requests for reconsideration with the Interior Board of Indian Appeals.

Congressional policymakers have struggled with the tribal recognition issue for decades. Since 1977, 28 bills have been introduced to add a statutory framework for the tribal recognition process (see table 1).

**Table 1: Bills Introduced to Provide a Specific Statutory Framework for Interior’s Tribal Recognition Process, as of December 31, 2004**

Session of Congress	Bills introduced in the House of Representatives	Bills introduced in the Senate	Total number of bills
95	H.R. 11630 H.R. 12691 H.R. 12830 H.R. 12996 H.R. 13773	S. 2375	6
96	H.R. 2701	a	1
97	a	a	0
98	a	a	0
99	a	a	0
100	a	a	0
101	a	S. 611 S. 912	2
102	H.R. 3430	S. 1315	2
103	H.R. 2549 H.R. 4462	S. 1844	3
104	H.R. 671 H.R. 2591 H.R. 2997	S. 479	4
105	H.R. 115	a	1
106	H.R. 361	S. 611	2
107	H.R. 1175 H.R. 3548	S. 504 S. 1392	4
108	H.R. 4213	S. 297 S. 462	3
<b>Total</b>	<b>17 House bills</b>	<b>11 Senate bills</b>	<b>28</b>

Source: GAO analysis.

<sup>a</sup>No bills introduced.

Of the House bills, only H.R. 4462 from the 103<sup>rd</sup> Congress was passed by the full House (on October 3, 1994). None of the Senate bills have been passed by the full Senate. Additional bills have also been introduced to recognize specific tribes; provide grants to local communities or Indian groups involved in the tribal recognition process; or, more recently, address the timeliness of the recognition process. For example, H.R. 4933 and H.R. 5134, introduced in the 108<sup>th</sup> Congress, and H.R. 512, which was introduced last week, have focused on the timeliness of the recognition process.

### **In 2001 the Recognition Process Was Ill Equipped to Provide a Timely Response**

BIA’s regulations outline a process for active consideration of a completed petition that should take about 2 years. However, because of limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties, we



reported in 2001 that the length of time needed to rule on tribal petitions for federal recognition was substantial. At that time, the workload of the BIA staff assigned to evaluate recognition decisions had increased while resources had declined. There was a large influx of completed petitions ready to be reviewed in the mid-1990s. The chief of the branch responsible for evaluating petitions told us that based solely on the historic rate at which BIA had issued final determinations, it could take 15 years to resolve all the completed petitions then awaiting active consideration.

Compounding the backlog of petitions awaiting evaluation in 2001 was the increased burden of related administrative responsibilities that reduced the proportion of time available to BIA's technical staff to evaluate petitions. Although they could not provide precise data, members of the staff told us that this burden had increased substantially over the years and estimated that they spent up to 40 percent of their time fulfilling administrative responsibilities. In particular, there were substantial numbers of Freedom of Information Act (FOIA) requests related to petitions. Also, petitioners and third parties frequently filed requests for reconsideration of recognition decisions that needed to be reviewed by the Interior Board of Indian Appeals, requiring the staff to prepare the record and respond to issues referred to the Board. Finally, the regulatory process had been subject to an increasing number of lawsuits from dissatisfied parties—those petitioners who had completed the process and had been denied recognition, as well as by petitioners who were dissatisfied with the amount of time it was taking to process their petitions.

Technical staff represented the vast majority of resources used by BIA to evaluate petitions and perform related administrative duties. Despite the increased workload faced by BIA's technical staff, the available staff resources to complete the workload had decreased. The number of BIA staff assigned to evaluate petitions peaked in 1993 at 17. However, from 1996 through 2000, the number of staff averaged less than 11, a decrease of more than 35 percent.

While resources were not keeping pace with workload, the recognition process also lacked effective procedures for addressing the workload in a timely manner. Although the regulations established timelines for processing petitions that, if met, would result in a final decision in approximately 2 years, these timelines were routinely extended, either because of BIA resource constraints or at the request of petitioners and third parties (upon showing good cause). As a result, only 12 of the 32 petitions that BIA had finished reviewing by 2001 were completed within 2 years or less, and all but 2 of the 13 petitions under review in 2001 had already been under review for more than 2 years.

While BIA could extend the timelines, it had no mechanism to balance the need for a thorough review of a petition with the need to complete the decision process. As a result, the decision process lacked effective timelines that would have created a sense of urgency to offset the desire to consider all information from all interested parties in the process. In fiscal year 2000, BIA dropped its long-term goal of reducing the number of petitions actively being considered from its annual performance plan because the addition of new petitions would have made this goal impossible to achieve.

We also found that as third parties, such as local municipalities and other Indian tribes, became more active in the recognition process—for example, initiating inquiries and providing information—the procedures for responding to their increased interest had not kept pace. Third parties told us they wanted more detailed information earlier in the process so that they could fully understand a petition and effectively comment on its merits. However, in 2001 there were no procedures for regularly providing third parties more detailed information. For example, while third parties were allowed to comment on the merits of a petition before a proposed finding, there was no mechanism to provide any information to third parties before the proposed finding. As a result, third parties were making FOIA requests for information on petitions much earlier in the process and often more than once in an attempt to obtain the latest documentation submitted. Since BIA had no procedures for efficiently responding to FOIA requests, staff members hired as historians, genealogists, and anthropologists were pressed into service to copy the voluminous records of petitions to respond to FOIA requests.

In light of these problems, we recommended in our November 2001 report that the Secretary of the Interior direct BIA to develop a strategy to improve the responsiveness of the process for federal recognition. Such a strategy was to include a systematic assessment of the resources available and needed that could lead to the development of a budget commensurate with the workload. The department generally agreed with this recommendation.

### **Timeliness Has Improved, but It Will Still Take Years to Clear the Existing Backlog of Petitions**

In response to our report, Interior's Office of Federal Acknowledgment has hired additional staff and taken a number of other important steps to improve the responsiveness of the tribal recognition process. However, it still could take 4 or more years, at current staff levels, to work through the existing backlog of petitions currently under review, as well as those ready and waiting for consideration. In response to our report, two vacancies within Interior's Office of Federal Acknowledgment were filled, resulting in a professional staff of three research teams, each consisting of a cultural anthropologist, historian, and genealogist. In September 2002, the Assistant Secretary for Indian Affairs estimated that three research teams could issue three proposed findings and three final determinations per year and eliminate the backlog of petitions in approximately 6 years, or by September 2008.

Through additional appropriations in fiscal years 2003 and 2004, the Office of Federal Acknowledgment was also able to utilize two sets of contractors to assist with the tribal recognition process. The first set of contractors included two FOIA specialists/record managers. The second set of contractors included three research assistants who worked with a computer database system scanning and indexing documents to help expedite the professional research staff evaluation of a petition. Both sets of contractors helped make the process more accessible to petitioners and interested parties, while increasing the productivity of the professional staff by freeing them of administrative duties.

In addition, the September 2002 Strategic Plan, issued by the Assistant Secretary for Indian Affairs in response to our report, has been almost completely implemented by the Office of Federal Acknowledgment. Among other things, the Office of Federal Acknowledgment has developed a CD-ROM compilation of prior acknowledgment decisions and related documents that is a valuable tool for petitions and practitioners involved in the tribal recognition process. The main impediment to completely implementing the Strategic Plan and to making all of the information that has been compiled more accessible to the public is the fact that BIA continues to be disconnected from the Internet because of ongoing computer security concerns involving Indian trust funds.

Even though Interior's Office of Federal Acknowledgment has increased staff resources for processing petitions and taken other actions that we recommended, as of February 4, 2005, there were 7 petitions in active status and 12 petitions in ready and waiting for active consideration status. Eight of the 12 petitions have been waiting for 7 years or more, while the 4 other petitions have been ready and waiting for active consideration since 2003.

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In conclusion, although Interior's recognition process is only one way by which groups can receive federal recognition, it is the only avenue to federal recognition that has established criteria and a public process for determining whether groups meet the criteria. However, in the past, limited resources, a lack of time frames, and ineffective procedures for providing information to interested third parties resulted in substantial wait times for Indian groups seeking federal recognition. While Interior's Office of Federal Acknowledgment has taken a number of actions during the past 3 years to improve the timeliness of the process, it will still take years to work through the existing backlog of tribal recognition petitions.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Committee may have at this time.

### **Contact and Acknowledgments**

For further information, please contact Robin M. Nazzaro on (202) 512-3841. Individuals making key contributions to this testimony and the report on which it was based are Charles Egan, Mark Gaffigan, and Jeffery Malcolm.

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